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Nos. 98-1648 and 98-1671

In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

CECIL J. PICARD, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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QUESTION PRESENTED

Section 7351(b)(2) of Title 20 permits local educational agencies receiving federal financial assistance to lend secular, neutral, and nonideological instructional equipment, instructional materials, and library materials acquired with that federal assistance to religious schools for the benefit of their students, as part of a program also serving public school students and nonsectarian private school students. The question presented is whether, in analyzing the claim that 20 U.S.C. 7351(b)(2), as applied in this case, violates the Establishment Clause of the First Amendment, the court of appeals was limited to considering the nature of the equipment and materials lent to religious schools, or whether it should also consider safeguards intended to prevent such equipment and materials from being diverted to religious use.

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BRIEF FOR THE SECRETARY OF EDUCATION

STATEMENT

1. This case involves an Establishment Clause challenge to the application, in Jefferson Parish, Louisiana, of a federal program that provides financial assistance to local educational agencies (LEAs) for education-improvement programs, and authorizes LEAs receiving federal financial assistance to lend instructional equipment, instructional materials, and library materials purchased with that assistance to private elementary and secondary schools, including religious schools, as part of a program that neutrally benefits students in public and private schools. The application of a related state program was also challenged. The federal program at issue here was substantially amended twice

during the course of this litigation and has had several titles; it is currently found at Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 55, as amended by the Improving America's Schools Act of 1994, Pub. L. No. 103-382, §§ 6001-6403, 108 Stat. 3707-3716. See 20 U.S.C. 7301-7373. For simplicity we will refer to the federal program as "Title VI"; previous decisions in this case referred to it as "Chapter 2."[1]

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[1] When this lawsuit was commenced, the federal program was known as Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, Tit. V, Subtit. D, Ch. 2, 95 Stat. 469-480; see 20 U.S.C. 3811-3863 (1982). Subsequently, in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130, the program was amended and redesignated as Chapter 2 of Title I of the ESEA. See 102 Stat. 203-219; 20 U.S.C. 2911-2976 (1988). In 1994, the program was again redesignated as Title VI of the ESEA, see 20 U.S.C. 7301-7373, as explained in the text. Unless otherwise indicated, references in this brief to provisions of Title 20 of the United States Code are to the current (1994) edition.

The current authorizations for appropriations and for disbursements by the Department of Education under Title VI extend through Fiscal Year 2000. See 20 U.S.C. 7302 (authorization through Fiscal Year 1999); 20 U.S.C. 1226a(a) (automatic one-year extension absent intervening legislation). If funds are appropriated for Title VI for Fiscal Year 2000, LEAs could expend those funds at the local level through Fiscal Year 2002. See 20 U.S.C. 1225(b). Therefore, the court of appeals' order prohibiting the loan of equipment and materials purchased with Title VI funds to religious schools is likely to affect LEAs, at a minimum, until September 30, 2002.

We have been advised that the President will shortly announce proposals for extensive revision of the ESEA upon the expiration of its current authorization. That proposed revision would not extend the authorization for Title VI in its current form. However, under the President's proposal, programs similar to many that are

Title VI authorizes financial assistance to LEAs and to state educational agencies (SEAs) to implement nine kinds of "innovative assistance" programs. See 20 U.S.C. 7351(a) and (b); see also Charter School Expansion Act of 1998, Pub. L. No. 105-278, § 2(2), 112 Stat. 2682. Among the kinds of programs that may be implemented with Title VI funds are programs "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program." 20 U.S.C. 7351(b)(2). As pertinent here, LEAs may use Title VI funds to purchase computer hardware and software for instructional use; they may also use such funds to acquire supplemental instructional materials and library materials.[2]

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currently funded under Title VI, which would permit the loan to private schools, including religious schools, of computer hardware and software for instructional use, would be funded under an expanded Title III of the ESEA. Like Title VI, Title III currently permits LEAs to use federal funds for the acquisition of hardware and software for use in classrooms and school libraries, see 20 U.S.C. 6844(3), requires LEAs to allow religious schoolchildren to participate in the benefits of programs on an equitable basis, see 20 U.S.C. 8893(a)(1) and (b)(1)(D), and also requires that any benefits made available be secular, neutral, and nonideological, see 20 U.S.C. 8893(a)(2). It is anticipated that the proposed revision of Title III will contain similar provisions.

[2] When this case was commenced in 1985, the permitted purposes of financial assistance under the program were somewhat differently focused. In particular, the program then expressly permitted LEAs to use federal funds for (among other things) the

Title VI requires that LEAs ensure that children enrolled in private nonprofit schools (as well as those in public schools) have the opportunity to benefit from programs financed with Title VI assistance. See 20 U.S.C. 7312, 7372. Moreover, Title VI expenditures by LEAs for private schoolchildren must "be equal (consistent with the number of children to be served) to expenditures * * * for children enrolled in the public schools of the [LEA], taking into account the needs of the individual children and other factors which relate to such expenditures." 20 U.S.C. 7372(b).

Any benefit provided to children in private schools, however, must be secular, and must not take the place of any services, equipment, or materials that the pri-

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acquisition and utilization of "instructional equipment and materials suitable for use in providing education in academic subjects for use by children and teachers in elementary and secondary schools." 20 U.S.C. 3832(1)(B) (1982). LEAs could, at that time, use federal funds to purchase instructional equipment such as slide projectors, cassette players, and filmstrip projectors, as well as computers. As a result of the 1988 amendments, the statute no longer expressly authorizes LEAs to use federal funds to purchase "instructional equipment," but it does expressly authorize the acquisition of computer hardware for instructional purposes. 20 U.S.C. 2941(b)(2) (1988); 20 U.S.C. 7351(b)(2). Both before and after the 1988 amendments, Title VI permitted LEAs to lend computer equipment for instructional purposes to religious schools. Further, computer equipment lent to religious schools has been an important part of this case since the beginning. See Complaint ¶ 41 (Dec. 2, 1985) (challenging loan of microcomputers to private schools for use by teachers and students); First Amended Complaint ¶ 43 (Jan. 13, 1987) (same); Second Amended Complaint ¶ 50 (Nov. 1, 1988) (same). And, as explained above (note 1, *supra*), we anticipate that, under the President's proposed reauthorization and revision of the ESEA, LEAs would continue to have authority to lend computer hardware and software to private religious schools.

vate school would offer or obtain in the absence of federal assistance. Thus, Section 7372 expressly provides that LEAs "shall provide for the benefit of such children in such [private] schools *secular, neutral, and nonideological* services, materials, and equipment." 20 U.S.C. 7372(a)(1) (emphasis added); see also 20 U.S.C. 8897 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter for religious worship or instruction."). Title VI also requires that the control of all Title VI funds "and title to materials, equipment, and property * * * shall be in a public agency * * * and a public agency shall administer such funds and property." 20 U.S.C. 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by "a public agency" or by a contractor who, "in the provision of such services, is independent of such private school and of any religious organizations." 20 U.S.C. 7372(c)(2). Further, Title VI funds for innovative-assistance programs must supplement, and in no case supplant, the level of funds that, in the absence of Title VI funds, would be made available for those programs from "non-Federal sources." 20 U.S.C. 7371(b).

An LEA that wishes to receive federal funds for a Title VI program must present an application to the pertinent SEA. The SEA is required to certify the LEA's application for funds if the application explains the planned allocation of funds among the nine kinds of programs permitted under the statute, sets forth the allocation of funds required to assure the equitable participation of private schoolchildren, and provides assurance of compliance with the statute's various requirements, including the requirement of participation of private schoolchildren in secular benefits under the

program. 20 U.S.C. 7353(a)(1)(A)-(B) and (3). The LEA must also agree to keep records sufficient to permit the SEA to evaluate the LEA's implementation of the program. 20 U.S.C. 7353(a)(4). The statute does not provide for review by the Department of Education of the LEA's application for Title VI funds.

The Department of Education's Title VI regulations emphasize the statute's limitations on assistance that may be provided to children at private schools. Those regulations explain that services obtained with federal funds must supplement, and not supplant, services that the private schools would otherwise provide their schoolchildren, 34 C.F.R. 299.8(a), and that the LEA must keep title to all property and equipment used for the benefit of private schoolchildren, 34 C.F.R. 299.9(a). In addition, the regulations require that the public agency "ensure that the equipment and supplies placed in a private school * * * [a]re used only for proper purposes of the program." 34 C.F.R. 299.9(c). As explained below, the Department has recently issued further guidance for LEAs on the participation of private schoolchildren in Title VI, addressing in particular procedures that LEAs should follow, and safeguards that LEAs should impose, to ensure that Title VI benefits afforded to private schoolchildren are secular. See pp. 15-16, *infra*.

2. In Louisiana, the State Bureau of Consolidated Educational Programs administers the Louisiana Title VI program. After Louisiana receives its Title VI funds from the federal government, the SEA allocates 80% of the funds to LEAs. Eighty-five percent of those funds is allocated to LEAs based on the number of participating elementary and secondary school students in both public and private schools, and 15% is allocated

based on the number of children from low-income families. Pet. App. 86a.[3]

For the school year 1984-1985 (immediately before this lawsuit was commenced), the Jefferson Parish Public School System (JPPSS) received $655,671 in Title VI funds. Approximately 70% of that money ($456,097) was used for equipment, materials, and services at public schools in the JPPSS, and the remaining amount ($199,574) was used for Title VI programs provided to students at private schools in the district. Pet. App. 86a. For the school year 1986-1987, the JPPSS received $661,148 in Title VI assistance. Approximately 32% of that amount ($214,080) was used to provide Title VI benefits to private schoolchildren in the district. Of the $214,080 budgeted for private schoolchildren, $94,758 was spent to provide library and media materials, and $102,862 was spent for instructional equipment. *Id.* at 90a. With respect to the State of Louisiana as a whole, about 25% of the total Title VI allotment was used for children in private schools. *Id.* at 86a.

The State of Louisiana, in administering Title VI, "never transmits dollars to [any] non-public school." Pet. App. 87a (brackets in original omitted). Moreover, because the statute requires that a public authority retain title to all Title VI equipment and materials, such resources are provided only on loan to private schools, and the ultimate authority and control over those items always rests with the public school system, not the private schools. *Ibid.*

The SEA and the LEA monitor the use of Title VI equipment and materials in private schools to determine whether they are used for purposes consistent

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[3] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 98-1648.

with Title VI, including the requirement that they be used only for secular purposes. Title VI Guidelines issued by the Louisiana SEA emphasize to the LEAs that "the LEA must ensure that [Title VI] equipment and materials * * * are used for secular, neutral and non-ideological purposes." Gov't Exh. D-4 in Opp. to Resp. Mot. for Summ. Judg. (State Guidelines) 22. The State Guidelines suggest that LEA representatives visit each private school site at least yearly and check the materials ordered to ensure that they are secular, neutral, and nonideological. *Ibid.* Representatives of the SEA visit each LEA every two years to monitor the LEA's implementation of the Title VI program, including the LEA's compliance with statutory requirements. Pet. App. 56a. In those monitoring visits, the SEA representatives examine whether the services, material, and equipment provided to private schools are secular, neutral, and nonideological. State Guidelines 22. In addition, the SEA encourages LEAs to have religious schools sign written assurances that Title VI equipment will not be used for religious purposes. *Id.* at 84; Pet. App. 87a. The JPPSS has also required signed assurances from each private school that material and equipment would be used in "direct compliance" with Title VI. Woodward Dep. Exh. 13; see Pet. App. 107a.

The record compiled below showed that, in Jefferson Parish, Ruth Woodward, the coordinator of Title VI programs in the JPPSS, notifies private schools each year of the allotment of Title VI funds available for services to students at those schools; those notices are accompanied by a reminder from the Director of the SEA that Title VI prohibits the acquisition of religiously oriented material. Woodward Dep. 62-63 & Exh. 3. Woodward also visits each private school every year

to discuss use of the Title VI equipment with a school official, such as the principal or a librarian, and to make sure that logs of use of Title VI equipment are kept, and that Title VI equipment is properly marked as such. *Id.* at 96-98, 102-103, 111. Woodward specifically inquires of private school officials whether the Title VI equipment and materials are used for secular, neutral, and nonideological purposes. *Id.* at 102, 111. Library books purchased for loan to private schools are personally approved by Woodward and another public school official from catalogues; they also personally review all requests by private schools for library books and other instructional materials, such as videocassettes and filmstrips, and delete titles that might indicate religiously oriented materials. *Id.* at 38, 88-89; Pet. App. 57a.[4]

3. On December 2, 1985, plaintiffs Mary Helms, Amy Helms, and Marie Schneider (hereafter respondents) brought suit in district court against federal, state, and local officials, claiming that several federal, state, and local programs as applied in Jefferson Parish, Louisiana, including Title VI, violated the Establishment Clause.[5] Respondents did not challenge Title VI on its

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[4] This monitoring by state and local officials revealed occasional lapses from Title VI's requirement of secularity, which were corrected. Woodward on one occasion discovered that 191 books purchased and lent to religious school libraries were in violation of Title VI guidelines. Those books were recalled and donated to a public library. Pet. App. 51a, 91a. A monitoring visit by the SEA to JPPSS also revealed a possible inappropriate purchase of a religious book for a religious school library, which led to a recommendation by the SEA that JPPSS be more careful in its oversight of Title VI, but investigation by Woodward disclosed that the book in question had not in fact been purchased with Title VI funds. *Id.* at 90a-91a.

[5] Although the other challenged programs were the subject of extensive decisions in both lower courts, they are not directly per-

face. Rather, they contended that one provision, authorizing federal funds to be used for the purchase of instructional equipment and materials, had been unconstitutionally applied in the Parish because such equipment and materials had been "transferred to nonpublic schools for their use." Second Amended Complaint ¶ 50 (Nov. 1, 1988). Respondents argued that this loan of instructional equipment and materials to private schools violated the Establishment Clause because (a) there were allegedly no safeguards in place to prevent the property lent to the private schools from being used for religious purposes, and (b) any monitoring that would be useful in preventing the use of instructional equipment for religious purposes would create an excessive entanglement between the government and private religious schools. *Id.* ¶ 52.

After discovery, the parties cross-moved for summary judgment on the constitutionality of the Title VI program in the Parish. In 1990, the district court initially concluded that the program was unconstitutional, and granted summary judgment to respondents on that issue. Pet. App. 137a-151a. The court concluded (*id.* at 148a-150a) that the practice of providing instructional equipment and materials to religious schools was controlled by this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Wolman* v. *Walter*, 433 U.S. 229 (1977), and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), which had invalidated state programs that provided instructional equipment and materials to religious schools.

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tinent to respondents' challenge to Title VI discussed herein, and will not be further addressed in this brief.

The government moved for reconsideration, and on January 28, 1997, the district court reversed itself and upheld the Title VI program as applied in Jefferson Parish. Pet. App. 82a-108a. The court relied heavily on the Ninth Circuit's then-recent decision in *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (1995), which upheld a "virtually indistinguishable" (Pet. App. 107a) Title VI program under which instructional equipment, including computers, was lent to religious private schools. The court emphasized that, as in *Walker*, the instructional equipment and materials lent to the private schools in Jefferson Parish were secular, that Title VI benefits were made available to students on a neutral basis and without reference to religion, and that all the monitoring controls in effect in *Walker* were also in effect in Jefferson Parish: library books and other instructional materials are prescreened by the LEA; most parochial schools sign a pledge agreeing not to use the materials for religious purposes; an LEA official visits the private schools every year; the SEA also monitors the LEA's implementation of the program; and no Title VI money is ever paid directly to religious schools. *Ibid.* In light of those factors, the court found that the Title VI program in Jefferson Parish "does not have as its principal or primary effect the advancement or inhibition of religion." *Id.* at 108a.

4. Respondents appealed to the Fifth Circuit. The court of appeals reversed, and held that Jefferson Parish's Title VI program, insofar as it was applied to provide instructional equipment and materials and library materials to religious schools, was unconstitutional under this Court's decisions in *Meek* and *Wolman*. Pet. App. 53a-71a. The Fifth Circuit expressly disagreed with the Ninth Circuit's *Walker* decision

upholding "a [Title VI] program that was, in all relevant respects, identical to the one * * * in Jefferson Parish." *Id.* at 59a.

After examining this Court's decisions regarding aid to religious schools and students, particularly *Meek*, *Wolman*, *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), the court of appeals concluded that those decisions "drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself." Pet. App. 66a. Whereas *Allen* had upheld the loan of textbooks to religious school students, *Meek* and *Wolman*, "while both reaffirming *Allen*, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren." *Id.* at 67a. The court of appeals also concluded that the "boundary lines" between permissible and impermissible assistance based entirely on the character of the aid were reaffirmed by *Regan*, which upheld aid to religious schools for the administration of standardized tests developed and required by the State, and which "clarified that *Meek* only invalidates a particular kind of aid to parochial schools—the loan of instructional materials." *Id.* at 68a.

The court rejected two arguments that these absolute "boundary lines" based on the character of the aid are inapplicable to this case. First, it concluded that the Ninth Circuit in *Walker* had erred in attempting to distinguish *Meek* and *Wolman* on the ground that the programs struck down in those cases "directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated," whereas Title VI is a "neutral, generally applicable statute that provides

PUBLISHER'S NOTE:

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6. In February 1999, the Department of Education issued amended Guidance for SEAs and LEAs on various aspects of Title VI, including the statutory requirement that all services, equipment, and materials made available to private school students be secular, neutral, and nonideological. See App., *infra*, 1a-9a.[7] The Guidance explains that LEAs "should implement safeguards and procedures to ensure that Title VI funds are used properly for private school children." *Id.* at 4a. First, "it is critical that private school officials understand and agree to the limitations on the use of any equipment and materials located in the private school." *Ibid.* To that end,

> LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for secular, neutral and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students.

Ibid.

Second, the Guidance makes clear that the LEA "is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes." App., *infra*, 4a. Thus, the LEA should "determine that any Title VI materials * * * are secular, neutral and nonideological[,] * * * mark all equipment and materials purchased with Title VI

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[7] A complete copy of this Guidance has been lodged with the Clerk.

funds so that they are clearly identifiable as Title VI property of the LEA[, and] * * * perform periodic on-site monitoring of the use of the equipment and materials[,] * * * includ[ing] on-the-spot checks of the use of the equipment and materials, discussions with private school officials, and a review of any logs maintained." *Id.* at 4a-5a. The Guidance also states that the Department of Education believes that, to monitor compliance with the requirements of Title VI, "it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools." *Id.* at 4a. Furthermore, the Guidance emphasizes that LEAs "need to ensure that if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use." *Id.* at 5a.

ARGUMENT

The court of appeals has read this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), to require invalidation of an Act of Congress, insofar as that statute has been applied to authorize the loan of instructional equipment, instructional materials, and library materials for the benefit of religious school students. Moreover, the court of appeals held that invalidation of the program was compelled by the character of the aid alone, irrespective of whether the aid was accompanied by safeguards with the purpose and effect of preventing the equipment and materials lent to religious schools from being diverted to religious purposes. That decision impairs the implementation of Title VI in the Fifth Circuit, and the decision's reasoning is likely to have similar adverse effects on other federal programs

designed to ensure that all schoolchildren—including those in religious schools as well as public schools and private nonreligious schools—have access to computers in their classrooms and school libraries. The court of appeals' decision also conflicts directly with a decision of the Ninth Circuit upholding a similar program. This Court's review is therefore warranted.

Further, while *Meek* and *Wolman* may be read as the court of appeals read them, we submit that neither the reasoning of those cases nor what this Court has identified as the fundamental principles of the Establishment Clause necessarily requires a categorical rule prohibiting the loan of all instructional equipment and materials to religious schools, without regard to whether the aid is accompanied by safeguards to prevent its diversion to religious purposes, or whether the aid is supplementary rather than a direct subsidy of the religious school's core educational program. The Court should therefore grant review to consider whether a categorical ban on lending secular instructional equipment and materials to religious schools should not apply where (a) the aid is accompanied by safeguards adequate to protect against its diversion to religious purposes, (b) the aid is only supplementary to the school's core educational functions, and (c) the aid provided to the religious school is part of a program that serves all students in public and nonprofit private schools, in a neutral and equitable fashion.

1. The court of appeals read this Court's decisions in *Meek* and *Wolman* as establishing a categorical prohibition against lending instructional equipment or materials or library materials purchased with public funds to religious schools. The court of appeals therefore rejected the argument that such loans of equipment and materials could be made if they supplemented, rather

than supplanted, the basic educational function of the schools, and if safeguards were established to prevent the diversion of the loaned materials to religious purposes.

Although that decision did not invalidate 20 U.S.C. 7351(b)(2) on its face, but rather held only that its particular application in Jefferson Parish was unconstitutional, as a practical matter it impairs the effectiveness of Title VI in the Fifth Circuit, insofar as that statute requires that religious school students be permitted to participate equitably in its benefits. See 20 U.S.C. 7372(b). Title VI sets forth nine kinds of innovative-assistance programs that may be implemented with federal financial assistance. See 20 U.S.C. 7351(b); Charter School Expansion Act of 1998, Pub. L. No. 105-278, § 2(2), 112 Stat. 2682. Experience has shown, however, that often the Title VI program most useful for private schoolchildren is precisely the kind of program invalidated by the court of appeals in this case, funded under 20 U.S.C. 7351(b)(2), which permits the loan of instructional materials and equipment, especially computer hardware and software, as well as library materials.[8] That sort of program also directly advances the important federal interest in ensuring

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[8] In school year 1997-1998, $16,472,226 was allocated in Title VI funds for programs serving students at private, nonprofit schools in 34 States. Of that amount, $12,513,910, or 76%, was used for instructional and educational materials. U.S. Dep't of Education, *Elementary and Secondary Education Act (ESEA): Title VI: Innovative Education Program Strategies, National Compendium of State and Local Activities, 1997-1998 School Year* 2.3 (Feb. 1999) (lodged with the Clerk). In Louisiana, of $572,751 allocated for private schoolchildren in the same year, $522,183, or 91%, was used for instructional and educational materials. See *id.* at 2.27.

that all schoolchildren have access to new technologies in instructional and library settings.[9]

The program at issue here provides for the loan of instructional equipment and materials to the private school, for use by students there. Because of resource constraints, it is not feasible to provide this kind of assistance by lending computers or software directly to each student, in a manner similar to the textbook-loan program upheld in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).[10] Nor, for the same reason, is it feasible to hire public school teachers to supervise the use of

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[9] Although Section 7351(b) theoretically permits the LEA to use federal funds for other kinds of programs, some of those other programs may in some circumstances present Establishment Clause concerns in the religious school setting, because they anticipate that the benefits be provided directly to the school, rather than to the schoolchildren. See 20 U.S.C. 7351(b)(3) (educational reform projects), (7) (school reform), and (9) (school improvement programs).

[10] For Fiscal Year 1999, Congress appropriated $375,000,000 to carry out the pertinent innovative-assistance programs under Title VI. See Department of Education Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, Tit. III, § 101(f), 112 Stat. 2681-368. We are informed by the Department of Education that approximately 53,400,000 students received Title VI services in school year 1994-1995 (the latest year for which such statistics were available). That number of students may be slightly overstated, because some students may receive services under more than one Title VI program, but it is believed to be a reasonably accurate estimate of the total number of students receiving Title VI services. Therefore, Congress has appropriated, for Title VI, about $7 per student. See also Pet. App. 63a n.18 (court of appeals noting that San Francisco Title VI program provided $6.65 in benefits per student). While that amount may be sufficient to provide students at each private school with a few items of equipment and materials, it is not sufficient to provide individual students with software or computer equipment.

Title VI instructional equipment and materials by students at religious schools, so as to bring the program under *Agostini* v. *Felton*, 521 U.S. 203 (1997), which permits public schoolteachers to give instruction to religious school students in religious school buildings.[11] In practical effect, therefore, the court of appeals has invalidated a form of federal assistance that is highly relevant for private schoolchildren, and also central to the effort to bring modern technology to all students.

Thus, although the court of appeals' decision does not prohibit the Secretary of Education from distributing funds under the statute to Louisiana for further distribution to LEAs in the State (including Jefferson Parish), it does restrict LEAs' ability to provide Title VI benefits to children who attend religious schools. Under the court of appeals' ruling, LEAs may find it difficult to comply with the statutory requirement that they ensure that private schoolchildren participate equitably in the benefits of Title VI. See 20 U.S.C. 7372(a)(1). The adverse consequences of the court of appeals' decision for the equitable participation of children in religious schools in the benefits of Title VI warrant this Court's review.

In addition, the kind of assistance that the court of appeals has invalidated is precisely the sort of assistance that will be even more important in the future, in the effort to make computer-assisted learning available to all children. For example, we are informed that the President will shortly propose a comprehensive revi-

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[11] For the same reasons, it would also be difficult, if not impossible in many instances, to hire public school teachers to give religious school students benefits under other Title VI programs, such as those designed to improve higher-order thinking skills or to combat illiteracy. See 20 U.S.C. 7351(b)(4) and (5).

sion of the ESEA that would establish a program specifically designed to provide advanced computer technologies to students, including students in religious schools. See note 1, *supra*. Although the court of appeals' decision invalidates only a particular program under the current Title VI, its reliance on *Meek* and *Wolman* for a broad ruling that no instructional materials or equipment of any kind may be lent to religious schools creates a serious question as to whether LEAs may continue to provide computer hardware and software under either the current version of Title III, see 20 U.S.C. 6844(3), or the revision of it to be proposed by the President.

2. The court of appeals' decision conflicts directly with the Ninth Circuit's decision in *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (1995), which upheld a "virtually indistinguishable" Title VI program (Pet. App. 107a). In that case, as in this one, private schools were lent instructional equipment and materials, including computer equipment; the schools were also lent library books and instructional materials, selected from prescreened lists to ensure their secularity. *Ibid.* The Ninth Circuit upheld the program, concluding in particular that it did not have the primary effect of advancing religion because the benefits under the program were available on a neutral basis without reference to religion, and because "controls are in place to prevent [Title VI] benefits from being diverted to religious instruction." 46 F.3d at 1467.

The Ninth Circuit's decision is not distinguishable from the Fifth Circuit's decision in this case on the ground that the Ninth Circuit found that the San Francisco program had adequate controls to prevent the diversion of instructional equipment to religious pur-

poses.[12] With one possible exception, those controls do not appear to have been significantly different from the controls in place in Jefferson Parish.[13] Indeed, even though the court of appeals in this case was aware that the program in *Walker* had in place various controls, it found the two programs to be, "in all relevant respects, identical." Pet. App. 59a.

More importantly, under the court of appeals' rationale in this case, the existence or extent of any such controls is simply irrelevant to the constitutional question, for the Fifth Circuit read *Meek* and *Wolman*

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[12] The Ninth Circuit did not consider the case before it to be controlled by *Meek* and *Wolman* in part because it read this Court's subsequent decisions as undermining those decisions. 46 F.3d at 1464-1466. We do not suggest that the Ninth Circuit properly concluded that it was not bound by *Meek* and *Wolman*. See *Agostini*, 521 U.S. at 237 (emphasizing that only this Court has the prerogative of overruling its own decisions, and that lower courts should not conclude that this Court's "more recent cases have, by implication, overruled an earlier precedent"). The Ninth Circuit may, however, have identified factors that legitimately distinguish Title VI from the programs invalidated in *Meek* and *Wolman*, and could be adopted by this Court to modify the holdings of those decisions, even if the Court does not disapprove those cases on their particular facts. See *Walker*, 46 F.3d at 1467 (discussing supplementary nature of Title VI); pp. 29-30, *infra* (discussing point that assistance under Title VI must supplement, and not supplant, resources otherwise available to LEAs and schools).

[13] The possible exception relates to computer equipment, for the Ninth Circuit noted that, at one point, computers lent to San Francisco private schools under Title VI had been "locked" for use only with prescreened software, thus ensuring that they could not be diverted to use with religiously-oriented software. See *Walker*, 46 F.3d at 1464. It does not appear, however, that other instructional equipment lent to religious schools, such as overhead projectors and videocassette players, was similarly "locked" for use only with prescreened materials. See *ibid.*

PUBLISHER'S NOTE:

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To the extent that *Meek* and *Wolman* announce a categorical rule prohibiting loans of instructional equipment and materials to religious schools, those decisions rest on two rationales, both of which are subject to reexamination in light of this Court's subsequent decisions. The first rationale is that, because religious elementary and secondary schools are typically considered pervasively sectarian, any aid to the educational function of such schools must be conclusively held to advance the religious as well as the secular aspects of the education that they provide, which are also deemed to be inextricably intertwined. See *Meek*, 421 U.S. at 364-366; *Wolman*, 433 U.S. at 249-251.

More recently, however, the Court has "departed from the rule * * * that all government aid that directly assists the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. To be sure, the *Agostini* decision, and the decisions on which it relied for the above-quoted statement (*Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), and *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986)), involved the distinct situations of instructional assistance provided directly to religious school students by public school personnel, and cash assistance provided directly to students (rather than religious schools) by public authorities. Nonetheless those decisions suggest a more nuanced rule than that announced in *Meek* and *Wolman*, so that loans of instructional equipment and materials to religious schools should not *conclusively* be presumed to advance the religious mission of such schools.[15]

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[15] Indeed, much earlier, in *Regan*, *supra*, the Court upheld a state statute authorizing reimbursement to private schools for the costs of administering state-required standardized tests because

Second, *Meek* and *Wolman* appear to rest also on the rationale that any safeguards adequate to prevent the diversion of instructional equipment and materials to religious purposes would require detailed supervision of religious schools' instruction, resulting in an impermissible entanglement between state and religion. See *Meek*, 421 U.S. at 366-367 n.16 (discussing *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), and lower-court decision in *Meek*). But again, in later cases, including *Agostini*, the Court has indicated that the stringency of its previous rules against interaction of public and religious institutions should be relaxed. *Agostini* observed that "[n]ot all entanglements * * * have the effect of advancing or inhibiting religion," and that "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." 521 U.S. at 233 (also citing *Kendrick*, 487 U.S. at 615-617); see also *Aguilar* v. *Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) ("state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute"). The danger of entanglement exists only where "*pervasive* monitoring," see *Agostini*, 521 U.S. at 234, must be employed to prevent public aid from being diverted to religious purposes.

"there was no substantial risk that the examinations could be used for religious educational purposes." 444 U.S. at 656; see *id.* at 659 (noting that the law "provides ample safeguards against excessive or misdirected reimbursement"). The Court explained in *Regan* that *Meek* should not be read to hold "'that all loans of secular instructional material and equipment' inescapably have the effect of direct advancement of religion." *Id.* at 661-662 (quoting *Wolman*, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

Thus, the question is not (as the court of appeals believed) whether this Court—having "discard[ed] a premise on which *Meek* relied—i.e., that substantial aid to the educational function of sectarian schools necessarily results in aid to the sectarian school enterprise as a whole"—has "replace[d] that assumption with the opposite assumption," namely that aid to religious schools is presumptively permissible. See Pet. App. 70a (internal quotation marks, brackets, and ellipsis omitted). Rather, each case should be assessed on its facts. Direct material aid to religious schools would violate the Establishment Clause if it were so extensive as to supplant resources that the school itself would otherwise provide or obtain, or if that aid were not protected against diversion to religious use by adequate safeguards, or if it favored religious schools over secular schools. In this case, therefore, the court of appeals should have the opportunity to consider whether the statutory limits on the uses to which Title VI aid may be put, together with the actual safeguards put in place by the SEA and the LEA, are in fact adequate to eliminate an unacceptable risk of diversion of resources to sectarian ends. The court of appeals also should have the opportunity to consider the Department of Education's recent Title VI Guidance explaining the kinds of safeguards that should be employed by LEAs administering Title VI programs (see pp. 15-16, *supra*).[16] And the court of appeals should

[16] Accordingly, should the Court conclude that, instead of the categorical rule applied by the court of appeals, a review of the adequacy of safeguards is appropriate, the Court may wish to remand the case to the court of appeals for further consideration, rather than addressing for itself in the first instance the adequacy of the safeguards, on which no findings were made by the court of appeals.

then consider whether such safeguards, if adequate, are in fact so intrusive that they inhibit the ability of religious schools to fulfill their religious mission, or otherwise require "excessive and enduring entanglement." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971).[17] But a

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[17] With respect to entanglement, the task of monitoring the use of instructional equipment and materials at religious schools is not likely to require the pervasive kind of surveillance about which the Court expressed concern in *Lemon*. In that case, involving (*inter alia*) state-sponsored salary supplements for religious school teachers, the Court observed that "a teacher cannot be inspected once so as to determine * * * subjective acceptance of the limitations imposed by the First Amendment," and that any effective means to prevent religious school teachers paid by the State from fostering religion would require "comprehensive, discriminating, and continuing state surveillance." 403 U.S. at 619. The same need not be true with regard to monitoring the use of instructional equipment and materials; schools can and do maintain logs documenting the classes in which such equipment and materials are used, the assignments that are carried out on them, and the teachers who use them. Such logs could be required as a condition of acceptance of the equipment and materials, and use of such equipment and materials could also be limited to classes in which the prospect of religious inculcation is relatively minimal. Cf. *Allen*, 392 U.S. at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion.").

One of the statutes examined in *Lemon*—unlike Title VI—also involved reimbursement of funds expended by religious schools. In that context, the Court held that state audits of religious schools' accounts to distinguish religious and secular expenditures would be impermissibly intrusive. See 403 U.S. at 621-622. But even if that particular rationale has survived the Court's subsequent decisions in *Kendrick* (see 487 U.S. at 616-617) and *Agostini* (see 521 U.S. at 233-234), which permit some governmental review of religious institutions' compliance with statutory requirements, the same danger is not present in Title VI. An LEA would not

categorical ban against loans of instructional equipment and materials to religious schools in all cases does not appear necessary to prevent "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Kendrick*, 487 U.S. at 611.

A further important point distinguishes Title VI from the assistance programs invalidated in *Meek* and *Wolman*. Title VI expressly requires that any assistance under that program (whether for private or public schools) supplement, and not supplant, non-federal resources available to the school—reflecting the inherently supplementary role the federal government plays in education. See 20 U.S.C. 7371(b); 34 C.F.R. 299.8(a). Moreover, the aid actually provided under Title VI on a per-student basis is quite small, compared to the other resources available to private schools. See p. 19 n.10, *supra* (appropriation of about $7 per student). The aid provided in *Meek*, by contrast, was described by the Court as "massive" (421 U.S. at 365), and the extent of the aid in *Wolman*, although less clear from the Court's opinion in that case, appears to have been quite substantial as well. See 433 U.S. at 233 ($88 million biennial appropriation for auxiliary aid to nonpublic schools).

In *Meek* and *Wolman*, it was reasonable to conclude that the aid programs "relieved sectarian schools of costs they otherwise would have borne in educating their students." *Zobrest*, 509 U.S. at 12 (so characterizing *Meek*). By contrast, because of the anti-

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have to examine a religious school's books to determine whether equipment was being used for improper purposes; indeed, Title VI proscribes any direct funding or reimbursement to religious schools. The LEA could review the purposes for which loaned equipment and materials had been used by examining the information maintained on logs.

supplantation rule of Title VI and the relatively small amount of money spent per student, it would be difficult to conclude that Title VI effects a "direct subsidy" to religious schools (*ibid.*), or that participation in the Title VI program permits religious schools to divert other resources, which would otherwise be used for secular purposes, to religious use. In addition, because Title VI benefits are offered to all students on a neutral basis without reference to religion, Title VI does not create "a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. Therefore, even if there should be a categorical rule prohibiting loan of instructional equipment and materials in some circumstances, it should be limited to situations where the aid program relieves religious schools of costs that they otherwise would bear, which is not the case under Title VI.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1999

APPENDIX

ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA)

as amended by

IMPROVING AMERICA'S SCHOOLS ACT OF 1994 (IASA)

GUIDANCE

for

Title VI of the ESEA
Innovative Education
Program Strategies

U.S. DEPARTMENT OF EDUCATION
WASHINGTON, D.C.

[Seal Omitted]

February 1999

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PURPOSE OF THIS GUIDANCE

This document contains guidance for Title VI of the Elementary and Secondary Education Act, as amended by the Improving America's Schools Act. Guidance in this document replaces all prior non-regulatory guidance for Chapter 2 of Title I of the former ESEA—the predecessor program to Title VI. Previous regulations for the former Chapter 2 program are no longer applicable, and no regulations will be issued for Title VI.

This document includes an explanation of statutory requirements contained in Title VI and provides guidance for carrying out programs under Title VI. This document does not impose any requirements beyond those in the Title VI statute and other applicable Federal statutes and regulations, but encourages varying views and focuses upon what can be done, rather than setting limits. State and local recipients that follow the guidance in this document shall be deemed in compliance with Title VI and other applicable Federal statutes and regulations by U.S. Department of Education officials, including the Inspector General.

Throughout the document, we have used several devices to aid the reader in the guidance. Examples are provided in several places and appear in thick-lined boxes. Examples are merely illustrative, and the Department encourages State Education Agencies (SEAs) and local educational agencies (LEAs) to refer to them only as guides that might be helpful in designing and implementing programs under Title VI. Other information that the Department believes will be help-

ful in planning and implementing programs appears in thin-lined boxes.

This document also includes interpretations that are in direct response to questions raised by the Title VI State coordinators. These interpretations appear throughout the document under the hearing "Supplemental Guidance."

For ready reference, an index of "Frequently Asked Questions" is included at the end of this document. These questions are cross-referenced to pages in the guidance answers can be found. Also, the relevant statutory and regulatory citations appear in parentheses following each question.

* * * * *

First, it is critical that private school officials understand and agree to the limitations on the use of any equipment and materials located in the private school. Therefore, LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for secular, neutral and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students.

Second, the LEA is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes. The LEA should determine that any Title VI materials, such as library books and computer software, are secular, neutral and nonideological. A good benchmark for this review is that the equipment and materials would be appropriate for use in public schools. The LEA should mark all equipment and materials purchased with Title VI funds so that they are clearly identifiable as Title VI property of the LEA. The LEA also should maintain an up-to-date inventory of all Title VI equipment and materials provided for the benefit of private school students. The Department also believes it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools. The LEA also should perform periodic on-site monitoring of the use of the equipment and materials. The monitoring could include on-the-spot checks of the use of the equipment and materials, discussions with

private school officials, and a review of any logs maintained.

Third, the LEA should designate one public school official to oversee Title VI services for private school students and ensure that services, materials and equipment provided for these students are secular, neutral and nonideological. The designated official also should be responsible for receiving and handling any complaints or allegations that Title VI funds are being used for improper activities for private school students.

Finally, LEAs need to ensure that if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use.

Supplemental Guidance

Benefit to Students—If Title VI funds are used to provide services for children enrolled in private, nonprofit schools, these services must primarily benefit the children, not the schools. (See section 6402(a)(1), 20 USC 7372(a)(1), which states that an LEA shall provide for services for the benefit of the children in private schools.) A question has arisen as to whether this precludes an LEA from providing reform-oriented Title VI services to private school children because of the likelihood that such services would benefit the private schools, rather than the children. The Department's interpretation is that if the LEA can show that the private school students will receive the primary benefit of reform-oriented Title VI services, the LEA may provide those services for the private school students, even if the private schools also happen to benefit. If the primary benefit of the reform-oriented

Title VI services would fall to the private schools, however, the Department believes that the LEA would not be able to provide reform-oriented Title VI services for the private school children.

FISCAL REQUIREMENTS

Supplement, Not Supplant

Section 6401(b) of Title VI of the ESEA provides that an SEA or an LEA may use and allocate Title VI funds only to supplement and, to the extent practical, increase the level of funds that would, in the absence of funds made available under Title VI, be made available from non-Federal sources. Title VI funds may not be used to supplant funds from non-Federal sources. (20 USC 7371(b))

Whether an SEA or LEA may use Title VI funds as part of any State-mandated program however, depends upon whether non-Federal funds are already available to carry out activities under the State-mandated plan. Section 6401(b) of Title VI prohibits the use of Title VI funds where such use would result in supplanting funds available from non-Federal sources. Presumably, in the absence of Title VI funds, the SEA or LEA would use State funds to carry out a State-mandated plan. To use Title VI funds in connection with the plan would therefore violate the supplement, not supplant requirement of Title VI. However, Title VI funds might be used in connection with the plan, without violating the supplement, not supplant requirement, if the Title VI funds are used for supplemental activities that would not have been provided but for the availability of the Title VI funds.

Example:
A State has a mandated program to test all students in grades one, four, six, nine and twelve. The State decides to use Title VI funds to test students in grades two, five and seven as part of a dropout prevention program. This use of Title VI funds is allowable

In general, an SEA or LEA should determine what educational activities it would support if no Title VI funds were available. If the result of this determination is that no State or local funds remain available to fund certain activities, then the SEA or LEA may be able to use Title VI funds for those activities. In no event, however, may an SEA or LEA decrease State or local funds for particular activities because Title VI funds are available.

Example: An LEA that qualified for State funds has been conducting a program for gifted and talented students. The State funds were based on the number of such children attending schools in the LEA. The number of these children in the LEA decreases and the LEA therefore no longer qualifies for the State funds. The LEA may choose to continue to operate this program using Title VI funds without violating the supplement, not supplant clause. This example presumes that the LEA would not fund the program out of other non-Federal funds in the absence of Title VI.

Maintenance of Effort

SEAs are required to maintain effort in order to receive their full allocation of Title VI funds for any fiscal year. The SEA maintains effort when either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the preceding fiscal year was not less than 90 percent of the combined fiscal effort or aggregate expenditures for the second preceding fiscal year. (See section 6401(a), 20 USC 7371(a)(1).)

The Department interprets "preceding fiscal year" to mean either the Federal fiscal year or the twelve-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Both State and local expenditures for free public education within the State are to be considered in determining whether a State has maintained effort under Title VI. The Department interprets "aggregate expenditures for free public education" to include expenditures such as those for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food service and student body activities. States may include in the maintenance of effort calculation expenditures of Federal funds for which no accountability to the Federal government is required. (Impact Aid funds are an example of such funds; however, there is a requirement of accountability for certain Impact Aid funds, such as those received for children with disabilities. Therefore, Impact Aid funds may be included in a State's maintenance of effort calculation under Title VI, but only to the extent that there is no accountability for their expenditure.)

States must be consistent in the manner in which they calculate maintenance of effort from year to year in order to ensure that the annual comparisons are on the same basis (i.e., calculations must consistently, from year to year, either include or exclude expenditures of Federal funds for which accountability to the Federal government is not required). Moreover, States that choose to include expenditures of Federal funds for which accountability to the Federal government is not required, must do so with the understanding that

future years' maintenance of effort calculations may be affected by fluctuating Federal appropriations over which neither the Department, nor a State, has any control.

Finally, it is the Department's position that expenditures not to be considered in determining maintenance of effort under Title VI are expenditures for community services, capital outlay, debt service, or any expenditures of Federal funds for which accountability to the Federal government is required.